IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0253

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSHUA HAWKEYE LEWIS,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fifth Judicial District Court,
Madison County, The Honorable E. Wayne Phillips, Presiding

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STATEMENT OF THE CASE AND FACTS

I. SPEEDY TRIAL

On March 12, 2007, Joshua Hawkeye Lewis (Lewis) was charged by citation with a misdemeanor violation of an order of protection. Lewis pled not guilty and proceeded to trial in justice court before a six person jury. Lewis was found guilty on August 29, 2007. Lewis filed a notice of appeal on September 11, 2007, providing notice of his intent to appeal the matter *de novo* before the Fifth Judicial District Court. (D.C. Doc. 0.1.)

On November 27, 2007, the district judge recused himself and on December 1, 2007, district judge E. Wayne Phillips assumed jurisdiction. (D.C. Doc. 2.) On May 16, 2008, Lewis filed a Notice of Confirmation of Defendant's Requests for Trial, stating that no omnibus order had been entered and re-confirming Lewis's demand for a trial *de novo* before the district court. (D.C. Doc. 3.)

Also on May 16, 2008, 248 days after Lewis filed his Notice of Appeal, Lewis filed a Motion to Dismiss for Lack of Speedy Trial and Supporting Brief.

(D.C. Doc. 4.) On June 2, 2008, the State filed a response brief and a Motion for Omnibus Hearing. (D.C. Docs. 6-7.) On June 16, 2008, Lewis filed a reply brief. (D.C. Doc. 8.) On July 17, 2008, the district court set a scheduling conference for August 5, 2008, for the purpose of setting a hearing on Lewis's speedy trial motion. (D.C. Doc. 9.) At the August 5, 2008 scheduling conference, a hearing was set for September 19, 2008. (D.C. Docs. 10-11.)

During the September 19, 2008 hearing, the district court realized that no omnibus order had been entered and no trial date set. (9/19/08 Hrg. at 54-56, 73.) At the close of the hearing, Lewis requested further briefing in light of this Court's holding in *State v. Ariegwe*, 2007 MT 204, 338 Mont. 442, 167 P.3d 815. Lewis was given until October 3, 2008, to file an additional brief. (9/19/08 Hrg. at 74.)

An omnibus order was issued on October 3, 2008, setting trial for December 5, 2008. (D.C. Doc. 19.) On the same date as the omnibus order was issued, Lewis filed his post-hearing speedy trial brief. At the time Lewis's post-hearing brief was filed, 388 days had elapsed since Lewis filed his notice of appeal. (D.C. Doc. 21.) The State filed a response to Lewis's post-hearing brief on October 14, 2008. (D.C. Doc. 23.) On November 10, 2008, the district court denied Lewis's motion to dismiss. (D.C. Doc. 36.)

The parties proceeded to trial by jury on December 5, 2008, 451 days after Lewis filed his September 11, 2007 notice of appeal. Lewis never requested a continuance and consistently asserted his right to a speedy trial.

The district court's Order denying Lewis's Motion to Dismiss contains several errors. As an initial matter, the district court asserts that "the parties agree 388 days elapsed from the Justice Court appeal and that the State is chargeable with the entire delay." (D.C. Doc. 36.) Although Lewis agrees that the State is chargeable with the entire delay, it was 451 days from the time Lewis filed his Notice of Appeal on September 11, 2007, until his trial date on December 5, 2008. With respect to the prejudicial impact of the delay and the prejudice caused, the district court misleadingly states as follows:

> This judge assumed jurisdiction on December 1, 2007. Neither Court nor counsel scheduled an omnibus hearing. Notice of May 16, 2008, p. 2. Subsequent to that notice, the State requested such a hearing but, inexplicably, the motion went unnoticed by the Court. Neither party bothered to notify the Court that the motion remained unanswered for two months.
>
> While the Court deems it only fair to assign the delay to the State as institutional delay, the Court notes very specifically that the claimed prejudice of the Defendant is greatly diminished by there being no effort to notify the Court of the long delay (December 1, 2007 to August 2008).

(D.C. Doc. 36.)

It is simply not correct that Lewis made no effort to notify the district court of the delay between December 1, 2007, and August of 2008. In fact, on May 16,

2008, Lewis filed a Notice of Confirmation of Defendant's Requests for Trial, specifically stating that no omnibus order had been entered and re-confirming Lewis's demand for a trial *de novo*. (D.C. Doc. 3.) On that same day, Lewis filed a Motion to Dismiss for Lack of Speedy Trial and Supporting Brief, stating that no omnibus hearing order had been entered or provided to Lewis. (D.C. Doc. 4.) On June 16, 2008, Lewis filed a reply brief, again indicating that no omnibus order had been issued and no omnibus hearing scheduled or conducted. (D.C. Doc. 8.) Contrary to the above-quoted statements of the district court, Lewis filed three separate documents with the district court between May 16, 2008, and June 16, 2008, informing the court of the delay. Nonetheless, the district court did not issue an omnibus order setting a trial date until October 3, 2008.

Lewis was only briefly incarcerated as a direct result of the change in this case. However, due in part to the charge, Lewis's probation was revoked and he served one-hundred sixty days in jail. (9/19/08 Hrg. at 20.)

Lewis testified at great length regarding the stress and anxiety that occurred as a result of being accused of the crime:

> Q. Mr. Lewis, as you sit here today before the Court, do you have any anxiety or concern about the delay in getting this case to trial?
>
> A. Yeah, it's been stressful. It affects my every day life. I have a hard time focusing at work because I am constantly thinking about how this is going to--the outcome of this or how it's going to turn out, if my defense is actually going to be there when I am ready to go to

trial again. So far, no date has been set for any future trial or anything. There's been no hearings held.

Q. How long has it been since you filed your appeal?

A. Over a year.

Q. Has this--does this anxiety and concern cause any physical manifestations? Do you have anything physical as a result?

A. Yeah. I mean, it's hard to prove that stress is making you sick, but I have stomach problems, I've had dental problems, I've had medical problems, And I can't prove that it's all stress related. But just physically, I know the kind of stress that I've been under, and until I get this wrapped up, you know, it just feels like I'm drowning a little bit every day, and that it just--it needs to get resolved in order for me to be able to move on with my life.

Q. Does the delay make you worry?

A. I'm extremely worried.

Q. And what are you worried about?

A. Just the outcome. I'm dealing with--the whole issue is between me and my father and that makes it extremely difficult. My son, my six-year-old son can definitely tell there's something that's bothering me. And it's just my job, my focus just isn't there.

Q. Do you try to make an effort to get on with your life?

A. I'm trying to, but I don't know how to move on with my life until we can get this resolved.

(9/19/08 Hrg. at 29-31.) Lewis's mother testified as well. (9/19/08 Hrg. 60-67.)

Additionally, Lewis testified about the affects the pending charge had to his

reputation in the community, the fact that Lewis lost his job due to his incarceration and the economic hardship that occurred. (9/19/08 Hrg. at 29-36.)

II. POLLING THE JURY

Following the six-person jury trial in district court, the jury announced that it had returned a unanimous verdict. However, when polled, juror Steven Parker Jackson (Jackson) indicated that he did not agree with the guilty verdict. Upon questioning, Jackson indicated that he had voted guilty for the sake of reaching a unanimous verdict:

> THE COURT: All right. Do you wish to poll the jury?
>
> MS. KRUER: Yes, sir.
>
> THE COURT: All right. If you'd please read the members of the jury. And folks, when they read your name, all you need to do is say yes you agree with the verdict. Or if you don't agree, say no.
>
> THE CLERK: Steven Parker Jackson, is this your verdict?
>
> [JACKSON]: No.
>
> THE COURT: Do you agree with the verdict?
>
> [JACKSON]: No.
>
> THE COURT: You don't agree with it?
>
> [JACKSON]: Well, I mean, we had to--I don't think it was right, but we had to do something.
>
> THE COURT: Well then, you've got to go back and reach an agreement that everybody agrees with.

[JACKSON]: Well, we did, Your Honor.

THE COURT: Well, then you have to say yes you agree with it. If you don't, say no. But you've got to decide or you've got to go back.

[JACKSON]: Okay, yes.

(12/5/08 Tr. at 300-01.) Once the remaining jurors were polled, the court further engaged Jackson:

THE COURT: All right. Mr. Jackson, I need to be sure that we've got this--You cannot be--feel coerced or forced. You have to agree with this verdict or not. And I need a firm yes or no from you.

[JACKSON]: Yes.

(12/5/08 Tr. at 301.) Once the jury was dismissed, defense counsel moved for a mistrial based on Jackson's comments. The district court denied the motion. (12/5/08 Tr. at 302-03.)

Lewis filed a timely notice of appeal to this Court.

SUMMARY OF THE ARGUMENT

Lewis did not go to trial until 451 days after filing his notice of appeal from justice court to district court. Lewis never requested a continuance and consistently asserted his right to a speedy trial. The district court misapplied the factors set forth in *Ariegwe* and erred when it denied Lewis's motion to dismiss for violation of his right to a speedy trial.

Following a six-person jury trial in district court, the jury returned a guilty verdict. However, upon polling, one of the jurors unambiguously indicated that he

did not agree with the guilty verdict. Upon questioning by the district court, the juror indicated that he had not agreed with the verdict, but had assented for the sake of unanimity. Once the juror unambiguously indicated he did not agree with the verdict, the district court should not have questioned him further. Moreover, the reason given by the juror was not proper and the district court erred when it determined the jury verdict was unanimous.

STANDARD OF REVIEW

Whether a district court properly denied a motion to dismiss is a legal issue which this Court reviews to determine whether the district court's interpretation was correct. *State v. Topp*, 2003 MT 209, ¶ 6, 317 Mont. 59, 75 P.3d 330.

Whether a jury verdict was unanimous constitutes a question of constitutional law. This Court's review of questions of constitutional law is plenary. *State v. Pyatt*, 2000 MT 136, ¶ 3, 300 Mont. 25, 1 P.3d 953.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED LEWIS'S MOTION TO DISMISS FOR VIOLATION OF HIS RIGHT TO A SPEEDY TRIAL.

Montana Code Annotated § 46-13-401(2) addresses the time in which a person charged with a misdemeanor must be tried:

> After the entry of a plea upon a misdemeanor charge, the court, unless good cause to the contrary is shown, shall order the prosecution to be dismissed, with prejudice, if a defendant whose trial has not been

postponed upon the defendant's motion is not brought to trial within 6 months.

However, "[t]he six month rule . . . does not apply in circumstances where the defendant is tried in justice court and judgment is appealed for trial *de novo* in district court . . . ." *State v. Mantz*, 269 Mont. 135, 138, 887 P.2d 251, 253 (1994). Instead, "[q]uestions regarding speedy trial in cases concerning new trials are analyzed under the constitutional standards of *Barker v. Wingo*, 407 U.S. 514 (1972)." *Mantz*, 269 Mont. at 138, 887 P.2d at 253 (citations omitted).

A criminal defendant's right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article II, § 24 of the Montana Constitution. *Ariegwe*, ¶ 20 (*citing Klopfer v. North Carolina*, 386 U.S. 213, 222-26 (1967)); Mont. Const. art. II, § 24. Pursuant to *Ariegwe*, a trial court must examine and balance four factors when assessing a speedy trial claim: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's responses to the delay; and (4) prejudice to the accused. *Ariegwe*, ¶¶ 20, 34. Since the right to a speedy trial is necessarily relative and depends upon circumstances, none of the foregoing four factors is either a necessary or a sufficient condition to the legal conclusion that the accused has been deprived of the right to a speedy trial, and the four factors must be considered together with such other circumstances as may be relevant to the analysis. *Ariegwe*, ¶¶ 102, 104 (quotations omitted).

A. Factor One: Length of the Delay

1. Step One: 200-Day Threshold

Under *Arigwe*, the first step in the speedy trial analysis is to determine whether the interval between a triggering event and trial is sufficient to trigger the four-factor balancing test. *Ariegwe*, ¶ 39.[1] A speedy trial claim lacks merit as a matter of law if the interval is less than 200 days. *Ariegwe*, ¶ 41.

Here, Lewis's December 5, 2008 trial occurred 451 days after Lewis filed his September 11, 2007 notice of appeal. The 200-day threshold has been satisfied.

2. Step Two: Extent of Delay Beyond 200-Day Threshold

Courts must consider the extent to which the delay stretched beyond the 200-day trigger date. The significance of this inquiry is twofold: first, the presumption that pretrial delay has prejudiced the accused intensifies over time, and second, the State's burden under Factor Two to justify the delay likewise increases with the length of the delay. *Ariegwe*, ¶ 62.

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[1] Generally, the triggering event is accusation. However, when a matter is appealed from justice court to district court, the triggering event is the date the defendant files a notice of appeal. *State v. Bullock*, 272 Mont. 361, 901 P.2d 61, 67 (1995) (*citing State v. Nelson*, 251 Mont. 139, 142, 822 P.2d 1086, 1088 (1991)).

Here, the district court asserts that "the parties agree 388 days elapsed from the Justice Court appeal and that the State is chargeable with the entire delay." (D.C. Doc. 36.) It was 451 days from the time Lewis filed his notice of appeal on September 11, 2007, until his trial date on December 5, 2008. This is significant delay, more than double the 200-day threshold.

B. Factor Two: Reasons for Delay

"[T]he State bears the burden of explaining the pretrial delays." *Ariegwe*, ¶ 65. The district court must identify and attribute each period of delay in bringing an accused to trial and then must assign weight to each period "based on the specific cause and motive for the delay." *Ariegwe*, ¶ 67. There are several degrees of culpability. At one end is bad faith or deliberate delay that exposes the accused to oppressive prosecution tactics. *Ariegwe*, ¶¶ 68-71. The next level of culpability applies to delays caused by negligence or lack of diligence on the part of the prosecution. *Ariegwe*, ¶ 69. A third level of culpability applies to institutional delays caused by circumstances largely beyond the control of the prosecution, such as overcrowded court dockets and scheduling conflicts. *Ariegwe*, ¶¶ 67-68. Finally, there may be "valid reasons" for delay attributable to the State such as postponement due to an unavailable material witness. *Ariegwe*, ¶ 70.

The district court improperly determined that 388 days of delay was attributable to the State as moderate institutional delay. (D.C. Doc. 36.) Here, it is

clear that the delay was caused by the fact that no omnibus hearing was set and no omnibus order was issued. This is not out of the prosecution's control; the prosecution could have and should have made a motion for an omnibus hearing well before June 2, 2008. Accordingly, this court should hold that the reason for delay was State negligence rather than institutional delay beyond the control of the prosecution.

C. Factor Three: The Accused's Responses to the Delay

Under Factor Three, the court must consider the accused's responses to pretrial delays, including whether the accused acquiesced in or objected to the delays. *Ariegwe*, ¶ 79. The accused's responses to the delays must be evaluated "based on the surrounding circumstances--such as the timeliness, persistence, and sincerity of the objections, the reasons for the acquiescence, whether the accused was represented by counsel, the accused's pretrial conduct (as that conduct bears on the speedy trial right), and so forth." *Ariegwe*, ¶ 80.

Here, Lewis never requested or agreed to a continuance and consistently asserted his right to a speedy trial.

D. Factor Four: Prejudice to the Accused

When an accused shows a delay of more than 200 days, a presumption of prejudice arises. *Ariegwe*, ¶ 45. This presumption, however, does not relieve either party of the burden of coming forward with evidence regarding the existence

or non-existence of prejudice. *Ariegwe*, ¶ 56. The length of the delay (Factor One) and the necessary showing of prejudice (Factor Four) are inversely related: as the delay gets longer, the quantum of proof that may be expected of the accused decreases, while the quantum of proof that may be expected of the State increases. *Ariegwe*, ¶ 49 (quotations omitted). On the other hand, the accused's responses to the delay (Factor Three) are directly related to the amount of personal prejudice suffered by the accused (Factor Four), which itself is "not always readily identifiable" or subject to proof. *Ariegwe*, ¶¶ 78-79. That the accused suffers prejudice from a violation of his right to speedy trial can be inferred from an accused's timely, persistent, and sincere complaints about the delays, and the stronger those complaints are, the more serious the prejudice is likely to be. *See Ariegwe*, ¶ 78 (*citing Barker*, 407 U.S. at 531-32).

The prejudice the speedy trial right was designed prevent focuses around three interests of the accused: (1) prevention of oppressive pretrial incarceration; (2) minimization of the anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired by dimming memories and loss of exculpatory evidence. And "prejudice may be established based on 'any or all' of these considerations." *Ariegwe*, ¶ 88.

1. Oppressive Pretrial Incarceration

When assessing whether pretrial incarceration is oppressive, the court must consider all of the circumstances surrounding the incarceration, including factors such as the duration of the incarceration; the complexity of the charged offense; any misconduct by the accused leading to the pretrial incarceration; and the conditions of incarceration. *Ariegwe*, ¶¶ 90-93. Moreover, the Court in *Barker* found that "even if an accused is not incarcerated prior to trial he is still disadvantaged by restraints on his liberty and living under a cloud of anxiety, suspicion and often hostility." *Barker*, 407 U.S. at 532-33.

Here, Lewis was only briefly incarcerated on the present charge. However, partly as a result of the present charge, Lewis's probation was revoked and Lewis served one-hundred, sixty days in jail. (9/19/08 Hrg. at 17-20.) As to the conditions of Lewis's incarceration, Lewis testified that there were no opportunities for self improvement, no opportunities for physical activity and the incarceration amounted to little more than sitting in a jail cell. (9/19/08 Hrg. at 20.)

2. Minimize the Accused's Anxiety and Concern

The question to be answered here "is whether the delay in bringing the accused to trial has unduly prolonged the disruption of his or her life or aggravated

the anxiety and concern that are inherent in being accused of a crime." *Ariegwe*, ¶ 97. This Court has noted that this is a more subjective interest. *Ariegwe*, ¶ 95.

Lewis testified at great length regarding the stress and anxiety that occurred as a result of being accused of the crime:

> Q. Mr. Lewis, as you sit here today before the Court, do you have any anxiety or concern about the delay in getting this case to trial?
>
> A. Yeah, it's been stressful. It affects my every day life. I have a hard time focusing at work because I am constantly thinking about how this is going to--the outcome of this or how it's going to turn out, if my defense is actually going to be there when I am ready to go to trial again. So far, no date has been set for any future trial or anything. There's been no hearings held.
>
> Q. How long has it been since you filed your appeal?
>
> A. Over a year.
>
> Q. Has this--does this anxiety and concern cause any physical manifestations? Do you have anything physical as a result?
>
> A. Yeah. I mean, it's hard to prove that stress is making you sick, but I have stomach problems, I've had dental problems, I've had medical problems, And I can't prove that it's all stress related. But just physically, I know the kind of stress that I've been under, and until I get this wrapped up, you know, it just feels like I'm drowning a little bit every day, and that it just--it needs to get resolved in order for me to be able to move on with my life.
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> Q. Does the delay make you worry?
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> A. I'm extremely worried.
>
> Q. And what are you worried about?

A. Just the outcome. I'm dealing with--the whole issue is between me and my father and that makes it extremely difficult. My son, my six-year-old son can definitely tell there's something that's bothering me. And it's just my job, my focus just isn't there.

Q. Do you try to make an effort to get on with your life?

A. I'm trying to, but I don't know how to move on with my life until we can get this resolved.

(9/19/08 Hrg. at 29-31.) Lewis's mother testified as well. (9/19/08 Hrg. 60-67.) Additionally, Lewis testified about the affects the pending charge had to his reputation in the community, the fact that Lewis lost his job due to his incarceration and the economic hardship that occurred. (9/19/08 Hrg. at 29-36.)

3. Limit the Possibility the Defense Will Be Impaired

This interest "concerns itself with issues of evidence, witness reliability, and the accused's ability to present an effective defense." *Ariegwe*, ¶ 98 (internal citations omitted). Impairment of the accused's defense is "the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can rarely be shown." *Ariegwe*, ¶ 99. As a result, it is not imperative that the accused make an affirmative showing that the delay impaired his defense. *Ariegwe*, ¶ 99. In such cases, impairment must be assessed based on other factors in the analysis including the length of the delay, the length of incarceration during the delay, and the accused's responses to the delay. *Ariegwe*, ¶ 100.

Although there was some concern that a witness would not be available to testify at trial, the witness did ultimately testify. Nonetheless, the length of delay, the length of incarceration during the delay and the accused's responses to the delay all suggest impairment.

4. District Court's Conclusion of Factor Four

The district court found that Lewis's testimony regarding stress and anxiety was not credible and that "absolutely no prejudice occurred to the Defendant. . . ." (D.C. Doc. 36.)

However, the district court weighed this factor incorrectly. As time passes on a speedy trial claim, a defendant does not have to provide more proof of the prejudice against him; a defendant has less to prove as it weighs heavier upon the State. *Ariegwe*, ¶ 49 (as the delay gets longer, the quantum of proof that may be expected of the accused decreases, while the quantum of proof that may be expected of the State increases). Therefore, the court should have looked to Factor Three (accused's responses to the delay) to see the correlation of the prejudice suffered in Factor Four. *Ariegwe*, ¶¶ 78-79 (The accused's responses to the delay are directly and strongly related to the amount of personal prejudice suffered by the accused which itself is "not always readily identifiable" or subject to proof.). Here, Lewis never requested or agreed to a continuance and consistently asserted his right to a speedy trial.

The district court failed to properly apply the law, *Ariegwe*, to this issue. In analyzing Factor Four, the district court seems to assume that Lewis had to overcome the evidence presented by the State that he was not prejudiced by the delay. Instead, *Ariegwe* established that the proving or disproving of the prejudice presumption lies in its intensifying effect. The longer the delay, the more likely the delay has prejudiced the accused. The "intensifying nature of the presumption of prejudice suggests simultaneously increasing (the State's) and decreasing (the accused's) burdens under Factor Four. *Ariegwe*, ¶ 49. Here, with a delay of 251 days after the trigger date it was incumbent upon the State to provide compelling justifications for the delay. The State failed to do so and the district court clearly didn't consider Lewis's desire for a speedy trial and only considered Lewis's testimony regarding prejudice, which the district court concluded was not credible. This is an improper application of the law as set out in *Ariegwe*.

E. Balancing the Factors

Determining whether an accused's right to a speedy trial was violated involves "[a] difficult and sensitive balancing process." *Ariegwe*, ¶ 102. "[B]ecause the right to a speedy trial is a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Ariegwe*, ¶ 153. None of

the four factors enunciated by this Court is either "a necessary or a sufficient condition" for a deprivation of the right to a speedy trial. *Ariegwe*, ¶ 102.

The district court in the present case, first concluded erroneously that "388 days elapsed from the Justice Court appeal and that the State is chargeable with the entire delay." (D.C. Doc. 36.) As is discussed above, the district court incorrectly analyzed the reason for the delay as well as the factor of prejudice. In terms of balancing the factors, the district court stated:

> Given that this Court finds the delays were institutional (but not acceptable), that the Defendant took no steps whatsoever to remedy the delay and that absolutely no prejudice occurred to the Defendant (no incarceration, complete lack of credibility as to the "stress" he alleged for this Order of Protection despite it being one of a long series), the Motion to Dismiss is **Denied**.

(D.C. Doc. 36) (emphasis in original).

The district court erred when it denied Lewis's motion to dismiss for speedy trial violation. The district court's denial of Lewis's motion to dismiss for speedy trial violation should be reversed as the factors weighed more heavily against the State than determined by the district court and overall weigh in favor of dismissal due to a speedy trial violation.

II. THE DISTRICT COURT ERRED WHEN IT DETERMINED THE JURY VERDICT WAS UNANIMOUS.

Article II, Section 26 of the Montana Constitution and Mont. Code Ann. § 46-16-603(1), require that jury verdicts in criminal actions be unanimous. As this Court has noted,

> [t]o ascertain unanimity, a defendant has the right to have the jury polled following return of the verdict. "If upon the poll there is not the required concurrence, the jury may be directed to retire for further deliberations or may be discharged."

Pyatt, ¶ 10 (*quoting* Mont. Code Ann. § 46-16-604).

When a polled juror gives an ambiguous response, the district court is required to inquire further regarding the juror's present state of mind. *Pyatt*, ¶¶ 15-17 (*citing New Mexico v. Holloway*, 740 P.2d 711 (N.M. 1987)). However, when a juror unambiguously indicates that he or she did not support a guilty verdict, the district court should not engage in further discussions with the juror. Rather, pursuant to Mont. Code Ann. § 46-16-604, the district court must either direct the jury to retire for further deliberations or discharge the jury. Failure to do so requires the matter to be reversed and remanded for a new trial. *Pyatt*, ¶¶ 9-21.

In *Pyatt*, the defendant requested that the jury be polled. The judge instructed the jurors as follows: "When your name is read, if you agree with the verdict, answer yes. If you don't agree with the verdict, answer no." *Pyatt*, ¶ 4.

One of the jurors, Jerome, answered "no" when his name was called. The following colloquy ensued:

> The Court: Wait a minute. You're saying that you do not agree with the verdict?
>
> Jerome: No. I was a hold out. I didn't agree with it, but I went along with it because everybody else did. I was outnumbered.
>
> The Court: Well, a unanimous verdict is required for either finding of guilt or finding of not guilty.
>
> Foreman: No one was coerced.
>
> The Court: I don't want to get into any discussion about it. What we have to know at this point we are polling the jury and each juror has to answer yes, do they agree with the verdict, or no, do they not agree with the verdict.
> Just the same as you did, supposedly did, in the jury room in indicating that you had a verdict. So Mr. Jerome, I'm going to ask you again. Do you vote in favor of the verdict or do you vote against?
>
> Jerome: I did vote in favor of the majority in the end. So I give him the yes vote.
>
> The Court: Your answer is yes. All right. The clerk will go forward and call the other names.

Pyatt, ¶ 5. The other jurors responded "yes" and the court announced that the verdict was unanimous. *Pyatt*, ¶ 6.

Distinguishing ambiguous responses from unambiguous responses, this Court held that when Jerome unambiguously stated that he did not agree with the verdict, the district court did not need to question Jerome further. In fact,

continued conversation with Jerome in the face of an unambiguous response, required remand for a new trial:

> Here, unanimity was not merely uncertain; Jerome's reply to the court's polling question regarding his present state of mind was unambiguous. Jerome responded "No" when his name was called after the jurors had been instructed, "If you don't agree with the verdict answer no." Jerome further stated that "I didn't agree with [the verdict], but I went along with it because everybody else did. I was outnumbered." Jerome's statements indicated that he did not agree with the guilty verdict at the time of the polling and that he had voted guilty during the jury deliberations in violation of the jury instruction that stated a juror should not vote for the sake of reaching a unanimous verdict.
>
> The court did not need to question Jerome further whether he assented to the announced verdict of guilty; Jerome's response clearly indicated that he did not. The court's continued conversation with Jerome thereafter was inappropriate under these circumstances. Once Jerome indicated that he did not agree with the verdict, the court should have either directed the jury to further deliberate or discharged the jury pursuant to § 46-16-604, MCA . . . .
>
> The judgment of the District Court is reversed and this case is remanded for retrial.

Pyatt, ¶¶ 18-21.

Moreover, although a hung jury may be required to deliberate further, under Montana law:

> "no juror should surrender his or her honest opinion as to the weight or effect of evidence or as to the innocence or guilt of the defendant

> because the majority of the jury feels otherwise, or for the purpose of returning an unanimous verdict or to prevent a mistrial."

Pyatt, ¶9 (*quoting State v. George*, 219 Mont. 377, 382, 711 P.2d 1379, 1382 (1986)).

The present case is indistinguishable from *Pyatt*. As in *Pyatt*, Jackson unequivocally responded "no" when polled by the district court. Moreover, as in *Pyatt*, Jackson's responses indicated that he did not agree with the guilty verdict at the time of the polling and that he had voted guilty for the sake of reaching a unanimous verdict:

> THE COURT: All right. Do you wish to poll the jury?
>
> MS. KRUER: Yes, sir.
>
> THE COURT: All right. If you'd please read the members of the jury. And folks, when they read your name, all you need to do is say yes you agree with the verdict. Or if you don't agree, say no.
>
> THE CLERK: Steven Parker Jackson, is this your verdict?
>
> [JACKSON]: No.
>
> THE COURT: Do you agree with the verdict?
>
> [JACKSON]: No.
>
> THE COURT: You don't agree with it?
>
> [JACKSON]: Well, I mean, we had to--I don't think it was right, but we had to do something.
>
> THE COURT: Well then, you've got to go back and reach an agreement that everybody agrees with.

[JACKSON]: Well, we did, Your Honor.

THE COURT: Well, then you have to say yes you agree with it. If you don't, say no. But you've got to decide or you've got to go back.

[JACKSON]: Okay, yes.

(12/5/08 Tr. at 300-01.) Once the remaining jurors were polled, the court further engaged Jackson:

THE COURT: All right. Mr. Jackson, I need to be sure that we've got this--You cannot be--feel coerced or forced. You have to agree with this verdict or not. And I need a firm yes or no from you.

[JACKSON]: Yes.

(12/5/08 Tr. at 301.) Once the jury was dismissed, defense counsel moved for a mistrial based on Jackson's comments. The district court denied the motion. (12/5/08 Tr. at 302-03.)

Once Jackson unambiguously responded "no," the district court should not have inquired further. Pursuant Mont. Code Ann. § 46-16-604, the district court should have either directed the jury to retire for further deliberations or the district court should have discharged the jury. Under this Court's holding in *Pyatt*, failure to do so requires remand for a new trial.

Moreover, once the district court did make further inquiry, it was clear that Jackson did not base his assent on his honest opinion as to Lewis's guilt, but rather, assented for the purpose of returning a unanimous verdict. This is not proper under

Montana law and the district court erred when it concluded that the verdict was unanimous. Accordingly, this Court should reverse and remand for a new trial.

CONCLUSION

For the reasons stated herein, this Court should dismiss based on violation of Lewis's constitutional right to a speedy trial. If this Court does not dismiss, this Court should reverse and remand for a new trial because the district court erred when it questioned the polled juror and when it concluded that the verdict was unanimous.

Respectfully submitted this 14th day of January, 2010.

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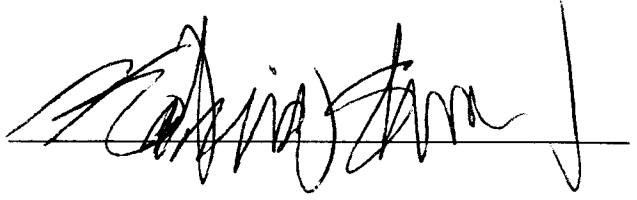
DATED: 1/14/10 

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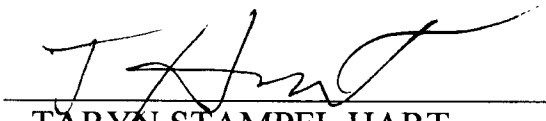

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